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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON, Petitioner,
LILLIAN BOEHM, Petitioner-Intervenor,
against
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

BRIEF OF PETITIONER, LILLIAN BOEHM, ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BOEHM,
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Lillian Boehm.

LOUIS BOEHM,
HARRY SHULMAN,
SAMUEL ZEIGER,
HARRY M. EDELSTEIN,
ELLIOT S. BENEDICT,
of Counsel.

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BRIEF OF PETITIONER, LILLIAN BOEHM, ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This case comes to this Court on certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit, entered on December 14th, 1932, reversing three

decrees of the District Court, Southern District of New York (R. 1036).

The petition of Johnson, complainant in the above first entitled action, for a writ of certiorari, was filed on February 18th, 1933 (No. 711), and the petition of Lillian Boehm, plaintiff-intervenor in said action, was filed on February 23rd, 1933 (No. 721). Both petitions were granted and certioraris allowed on March 20th, 1933 (R. 1049).

Opinions Below.

The opinion of the District Court, by Judge Woolsey, is reported in *1 Fed. Supp.* 909, and appears in the Record before this Court at page 694. The opinion of the Circuit Court of Appeals, by Judge Hand, reversing the decrees of the District Court is reported in *61 Fed.* (2d) 934, and appears in the Record at page 1024.

Statement of the Case.

Relationship of Interborough and Manhattan.

The Manhattan Railway Company, herein called Manhattan, is a New York corporation owning a system of rapid transit elevated lines in New York City. It has outstanding $60,000,000 of capital stock; $40,680,000 Consolidated First Mortgage 4% Bonds, and $4,523,000 Second Mortgage 4% Bonds (R. 23, 159, 160).

On January 1st, 1903, Manhattan leased its railroads to the Interborough Rapid Transit Company, a New York Corporation, herein called Interborough, for a term of 999 years. This lease provided that as rent Interborough shall pay all taxes imposed upon Manhattan and its property, also principal and interest on its bonds, and a 7% dividend upon its stock. Under the so-called Readjustment Plan of 1922, this "guaranteed" 7% divi-

dend was modified to a 5% dividend, payable if and when earned (R. 26-29).

Interborough operates an extensive system of rapid transit railroads in New York City. The lines are of two kinds: the first, the Manhattan elevated leased lines, and the second, elevated and subway lines owned by the City of New York and leased to Interborough, and partly owned by Interborough (R. 153-156).

Interborough has outstanding capital stock of $35,000,000; $132,000,000 First and Refunding Mortgage Bonds, secured by first mortgage on the Manhattan and municipal leases and the Interborough's equipment; plus an additional $5[illegible],000,000 of these bonds pledged to secure an outstanding issue of $32,000,000 approximately, of Ten-Year Secured Convertible 7% Gold Notes; and $10,000,000 of 6% Notes due October 1, 1932 (R. 158, 159).

Under this lease arrangement, Manhattan became a mere corporate shell and has so continued since 1903. It has no managing or operating personnel. Its properties and business are completely under Interborough control and have been since the latter took it over lock, stock, and barrel in 1903. Three of the four members of its Executive Committee are Interborough directors. Interborough, for years, has sacrificed Manhattan's interest for its own financial benefit, flagrantly violating its obligations under the lease. It failed to operate modern cars over the Manhattan lines as it does upon its own lines. It permitted the Manhattan stations and properties to become dilapidated in appearance compared with its own, notwithstanding a specific duty imposed under the lease "to keep the properties in good condition and repair, so that the business of the leased railways shall be preserved, encouraged and developed * * *." Its failure to provide modern and comfortable cars and to keep up the appearance of the physical properties reacted to Manhattan's detriment and Interborough's

benefit, in that passengers seeking comfort and safety turned to the use of the subway rather than the elevated lines (R. 59-61).

The Manhattan lease, which for many years had been vastly profitable to Interborough, it now claims to consider burdensome. It attributed its financial loss sustained in operation to the Manhattan lines. Statements were made in its behalf and frequent items appeared in the press and elsewhere that Interborough would cut loose from the Manhattan lines. The charge has been made and freely circulated in the public press and in financial and statistical publications that Interborough has for some time planned to drop the Manhattan lease, and that to accomplish this result, it placed itself in the hands of equity receivers, who, as such, might disaffirm the lease (R. 36, 41-42, 57).

In April, 1932, instructions were issued by J. P. Morgan & Company, the Interborough bankers, that the real estate and franchise taxes of Manhattan, due May 1, 1932, amounting to $860,000 were not to be paid although at that time Interborough had in its treasury approximately $5,000,000 and was well able to pay the same (R. 70, 682). The three directors of Manhattan who were also on the Interborough Board voted for a resolution to carry this instruction into effect. Incidentally, the senior member of this banking firm is the Chairman of the self-appointed 5% Bondholders and 7% Noteholders "Protective Committees" of Interborough, whom their counsel have sought to describe as "innocent victims of this controversy" (R. 189-192).

This purposeful non-payment of the Manhattan taxes which fell due May 1, 1932, cast before it the shadow of a threatened default in Interborough's payment of the semi-annual interest of $813,660 on Manhattan's first mortgage bond issue which was to become due on October 1, 1932. Non-payment would constitute a default unless cured within sixty days, and would entitle the

trustee and the bondholders to exercise a right of acceleration of principal of the mortgage (not due for 58 years), and the sale of the Manhattan property at public auction (R. 34, 35, 36).

Against this background, we may now view the proceedings which took place in the District Court, which are now under review.

The Brake Shoe Case.

On June 30th, 1932, Rules 1-a and 11-a of the General Rules of the District Court, for the Southern District of New York, were adopted by all the eight judges of the District, effective July 1st, 1932, and an appropriate order signed by all the District Judges duly entered (R. 702). Rule 1-a provided:

> "Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge" (R. 702).

Rule 11-a provided:

> "All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (* * *) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the Court, *and to no other* judge" (R. 702). (Our italics.)

They were adopted pursuant to Sections 731 and 27, Title 28, U. S. Code.

Section 731 grants the District Courts statutory power to enact rules to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 27 empowers the District Courts to provide for the division of their business. It reads:

> "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; *but in case they do not so agree,* the senior circuit judge of the circuit in which the district lies, shall make all *necessary* orders for the division of business and the assignment of cases for trial in said district." (Our italics.)

On June 29th, 1932, two schedules were filed in the Clerk's office setting forth the assignment of judges and the division of work in the District Court for the year just begun, signed by all the District Judges (R. 701).

Under this agreed division of business, Judge Patterson was assigned to hold the Bankruptcy and Motion Part from August 15th to 29th, 1932 inclusive (R. 702).

On August 25th and 26th, 1932, Judge Patterson was in Court or in his Chambers throughout the day, functioning in all respects as Judge of the Motion Part, ready to deal with any applications for equity receiverships (R. 702).

On August 25th, 1932, "Interborough" counsel, and counsel for its simple contract creditor, American Brake Shoe & Foundry Company, attended before Judge Manton, Senior Circuit Judge, in his Chambers, and requested him to designate himself to hold a District Court so that he could entertain an application for the appointment of receivers in a creditor's action about to be brought. They presented an affidavit of Interborough's counsel, entitled in that action, though not yet begun, stating as the ground for this unusual request his fear that Judge Patterson might possibly appoint a trust company rather than an individual as receiver (R. 175; 1 Fed. Supp. 820, Manton, J.).

Judge Manton gave prompt response to this request. On the same day, August 25th, 1932, he signed two orders as Senior Circuit Judge, which we shall call the "Order of Designation," and the "Division of Business

Order." By the first order, acting upon his own initiative, without any representation from the Senior District Judge, and without making any inquiry of Judge Patterson, he found that the "public interest' 'required him to designate himself to hold a District Court commencing on that day "particularly to hear and determine all applications and proceedings in the matter entitled "American Brake Shoe & F. Co. v. Interborough R. T. Co.," as yet not commenced, and accordingly he so designated himself. The order recited as its authority, 28 U. S. C. A., §22, which provides that the Senior Circuit Judge may, *if the public interest requires*, designate or assign any Circuit Judge to hold a District Court within the circuit (R. 702-705).

Having thus become by self-designation a judge with District Court jurisdiction, he thereupon reported to himself as Senior Circuit Judge, that Judge Manton, acting as District Judge, disagreed with the division of business of the District Court, and thereupon, as Senior Circuit Judge, he signed the second order that for thirty days thenceforward applications for appointment of receivers could be made not only before the District Judge assigned to the Motion Part under Rule 11-a, but also to himself, acting as District Judge (R. 178). The order recited as its authority the Judicial Code, Sec. 23 (28 U. S. C. A., §27).

These two orders, bound together under one cover, and so interlocked and combined in their common purpose as to be regarded as one order, were filed on the following day, August 26th, 1932, in the Clerk's office (R. 715).

On the same day, August 26th, the Brake Shoe company filed its creditor's bill against Interborough, upon a simple contract claim of $27,000, praying for an equity receivership (R. 153, 170). On the same day, Judge Manton, upon this bill and Interborough's consent, signed an order appointing Victor J. Dowling, and Thomas E. Murray, Jr., temporary receivers of Interborough, and

reserving to himself full right and jurisdiction over the cause (R. 180, 184, 705, 715). He made a further order on the same day appointing Chadbourne, Stanchfield & Levy, as receivers' counsel (R. 185).

No application for a receivership order in the Brake Shoe case was made to Judge Patterson at any time on August 25th or 26th, nor did Judge Manton, as District Judge, apply on either of those days to Judge Knox, as Senior District Judge, under Rule 1-a for an assignment of the Court's business, or for an assignment specifically to hear the Brake Shoe case (R. 717, 718).

A poll of all the District Judges disclosed that there was no disagreement among them as to the division of business (R. 717).

Subsequently, on September 6th, 1932, Judge Manton extended the receivership to the Manhattan Railway upon its application and consent, and appointed William Roberts, Esq., as receiver of Manhattan, subject to Interborough's rights and possession, and expressly without prejudice to any right of Interborough or its receivers to disaffirm its lease with Manhattan (R. 196, 198).

Both receivership orders contained show cause provisions returnable September 22nd, 1932, for continuance of the receiverships *pendente lite* (R. 184, 200). On September 28th, 1932, Judge Manton continued them *pendente lite*, and extended the equity term until termination of the Brake Shoe proceedings under these receiverships, or, in any event, for three years thereafter, and reserved to himself full and exclusive jurisdiction of the cause (R. 223-5).

Petitioners contend that the Brake Shoe suit is a collusive action brought by Interborough through the "friendly" auspices of the Brake Shoe Company appearing in the guise of a plaintiff; that the ultimate purpose of the action was to enable Interborough to rid itself of the burdensome obligation of the Manhattan lease. Petitioners contend that Interborough and its bankers further

planned, through the instrumentality of receivers friendly to and controlled by them, to permit a default in the payment of Manhattan First Mortgage interest and taxes, with a resultant foreclosure of the Manhattan properties, the wiping out of $5,000,000 of Second Mortgage Manhattan Bonds, and of $60,000,000 of Manhattan stock, and the forced sale of the Manhattan's valuable properties, which Interborough's bankers could buy in for a nominal sum, giving Manhattan's First Mortgage bondholders a fraction of what was due them, and completely wiping out the stockholders and junior bondholders. The Brake Shoe suit, petitioners contend, was brought for the immediate purpose of placing Interborough in the hands of receivers "friendly" to its present management and its bankers, and sympathetic to its purposes and policies.

The Brake Shoe bill showed that plaintiff was a simple contract creditor for $27,000. Interborough, with aggregate assets of $500,000,000 at the time, had over $5,000,000 cash on hand, out of which it could well have paid this indebtedness (R. 74, 75, 78). The allegation of demand and refusal in the bill was a sham and pretext to create an appearance of controversy when none in fact existed. The parties on the contrary were actually cooperating to achieve a common result. Furthermore, its claim was based upon the sale of brake shoes and castings used in operating the lines (R. 164). For operating expenses, Interborough had a special fund available under contracts with the City (*Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 196, 198). Under these circumstances, Brake Shoe had no right to a receiver in equity for general assets unless this special fund was exhausted or insufficient, of which no allegation was made.

No claim was made in the Brake Shoe bill that the Interborough had attempted to obtain an extension of the notes which were shortly to mature. On the contrary, it appears affirmatively from the affidavit of Louis Boehm, that no such request was made either to him or

Lillian Boehm, his wife, the holder of a substantial amount of these notes (fol. 2055). On a previous occasion of financial stress, in 1922, when Interborough's Secured Convertible 7% Gold Notes became due, it sought and obtained from its bondholders an extension of these notes, and from Manhattan's stockholders their assent to the modification and reduction of the guaranteed dividend rental.

That the Brake Shoe Bill was prepared at Interborough's request and in collusion with it, may be readily inferred from the filed papers themselves. Highly elaborate petitions and orders for the appointment of receivers and counsel were presented on August 26th to Judge Manton (R. 180, 185, 706). The voluminous bill of complaint was verified on August 25th, 1932 (R. 170). The bill and answer were filed August 26th (R. 715). The bill set forth in great detail Interborough's assets, obligations, financial structure, indebtedness, resources, and solvency, all upon information and belief; the verification was made by plaintiff's Assistant Treasurer, and no source of information was stated other than the general allegation that he had made inquiries concerning Interborough's present condition, and from such inquiries had learned the facts alleged (R. 170). The affidavit of Mr. Quackenbush, the receivers' petition for appointment of counsel, and the affidavit of Mr. Chadbourne, receivers' counsel, were all notarized by a single notary public, Mr. Peacock, an attorney regularly employed in the office of Mr. Quackenbush, Interborough's counsel (R. 176, 233, 235). Plaintiff expressly waived answer under oath (R. 169).

Chadbourne, Stanchfield & Levy, appointed as Interborough Receivers' counsel, were for several years last past closely associated with Brooklyn-Manhattan Transit Company, which owns a large block of Interborough stock. The Chairman of its Board of Directors is likewise Chairman of Interborough's Board. Interborough,

Manhattan, and Brooklyn-Manhattan have directors in common (R. 24, 72, 120). Mr. Charles L. Hayden is director in all three companies; he is senior member of the banking firm of Hayden, Stone & Co., and, incidentally, is Chairman of the so-called Protective Committee for the Interborough Ten-Year 6% Gold Notes (R. 59, 193). Mr. Chadbourne had been, for the past several years, special counsel for Brooklyn-Manhattan, and also counsel for Hayden, Stone & Co. But a few days before the filing of the application for receivership herein he represented Brooklyn-Manhattan before the Transit Commission (R. 24, 72, 120).

On October 10, 1932, after commencement of the Johnson suit, and the service of the show cause order to vacate the appointment of the Interborough receivers and counsel, Mr. Chadbourne resigned as counsel for Interborough receivers (R. 548-550).

Judge Dowling, when appointed receiver, or at least very shortly prior thereto, was a partner in Mr. Chadbourne's firm, whose close interest and associations with Interborough, Brooklyn-Manhattan and Hayden, Stone & Co. have been already described. When appointed, he was sojourning in Europe, and Mr. Chadbourne made public statement to the effect that Judge Dowling's appointment as Receiver would probably necessitate the severance of his connection with the Chadbourne firm. On his return from abroad on September 7th, when interviewed by the press, Judge Dowling made the statement that he was not certain whether he would have to resign from the firm. His affidavit of qualification circumspectly failed to state when in fact he did resign (R. 24, 72, 73, 498).

The appointment of Mr. Roberts as Manhattan Receiver was sponsored by Interborough-Brooklyn-Manhattan Transit interests. At the time of such appointment he was president, director and counsel of Manhattan, and for some time prior thereto, it is alleged, was under the domination and control of the Brooklyn-Manhattan and

Interborough interests. Practically throughout his tenure of office, while Interborough flagrantly violated the Manhattan lease, he stood by passively and did nothing (R. 25, 70-72).

The Interborough receivers have faithfully pursued the Interborough's policies. Under the protection of the Court's decree against interference, they have kept possession of Manhattan's properties, collected the Manhattan income, yet failed to pay the Manhattan taxes and mortgage interest, representing in part the lease rental, so that a default for non-payment of interest on the Manhattan First Mortgage occurred on Oct. 1, 1932. Their attitude would have caused a foreclosure with the consequent wiping out of the Manhattan leasehold, its second mortgage bonds, and the stock, had not Judge Manton upon the application of the Mortgage Trustee, and on the recommendation of Basil O'Connor, as Special Master, on the last day of the grace period directed the receivers to make payment. On April 1st, 1933, the first mortgage interest again fell due and the Interborough receivers have again suffered a default, placing the Manhattan bondholders and stockholders again in the same jeopardy.

The Johnson Suit and the Boehm Intervention.

On September 21st, 1932, a day before the return of the rule *nisi* in the Brake Shoe case, Benjamin F. Johnson, a citizen of Kentucky, and holder of 100 shares of Manhattan, filed his bill of complaint in a representative Manhattan stockholder's action against the Interborough, joining all the parties in the Brake Shoe case, including the Manhattan and Interborough Receivers, and alleging, among other things, that the orders of Judge Manton, particularly the order of designation, order of division of business, and orders appointing receivers, were void and beyond his jurisdiction, since he lacked power to make the first two orders, and had violated Rules 1a and

11a in appointing receivers. The bill alleged also the facts, above set forth, charging that the Brake Shoe suit was a friendly, collusive, arrangement aimed at the ultimate abrogation of the Manhattan lease and the appointment of friendly receivers sympathetic to Interborough's purpose. The bill prayed that these, and all subsequent, orders of Judge Manton in the Brake Shoe case be vacated and set aside, that new receivers independent of, and disassociated with, the Interborough, or Brooklyn-Manhattan Transit Company, and their respective officers, bankers, or counsel, be appointed, and for an accounting between Manhattan and Interborough, and other general relief. Johnson later filed a supplemental bill and supplemental petition amplifying his Bill and further supporting its prayer (R. 13-48, 49-66, 69-76).

On the same day, September 21st, 1932, Lillian Boehm, holding 1,400 shares of Manhattan stock, $117,000 of the Manhattan First Mortgage Bonds, and $60,000 Interborough First Mortgage Bonds, and $35,000 of Interborough Secured Convertible 7% Gold Notes (which matured September 1st, 1932, and were then in default), by leave granted, duly intervened as party plaintiff in the Johnson suit (R. 137). She filed a supplemental bill as a secured Interborough creditor, based upon the same general grounds as the Brake Shoe bill, but in addition alleged that the proceedings in the Brake Shoe case were void and prayed the vacation of Judge Manton's orders of August 25, 1932, and all his subsequent orders in the Brake Shoe case, and for the appointment of new receivers for Interborough, and new counsel for such receivers, independent of and disassociated from Interborough, Manhattan, Brooklyn-Manhattan Transit Co. and their officers, bankers, attorneys, and counsel (R. 80-113).

On motion of Johnson and Boehm, upon three orders to show cause, Judge Woolsey vacated all the decrees of Judge Manton in the Brake Shoe case upon the ground that his actions in the District Court were *coram non*

judice (R. 114, 123, 130, 725, 694-725; *1 Fed. Supp.* 809). He refused to vacate Judge Manton's Order of Designation and Order for the Division of Business, on the ground that, being orders of the Senior Circuit Judge, they were beyond his jurisdiction to vacate. He withheld the appointment of new receivers, however, pending appeal from his decision, but provided if no appeal be taken within twenty days, or his decision be affirmed on appeal, that application may be made under Rule 11a to the Judge then sitting in the Motion Part for the appointment of new receivers. Before entering the vacating decrees, Judge Woolsey, on his own motion, entered a decree consolidating the Johnson suit with the Brake Shoe suit (R. 697-8, 722).

On appeal to the Circuit Court of Appeals, Second Circuit, Judge Woolsey's orders were reversed (61 Fed. 2d, 934). The review of this determination is now sought.

POINT I.

The issues in this case concern not merely the private rights of the party litigants. They touch the fundamental proprieties in the internal administration of the Federal District Courts and arise from a continuing conflict with reference thereto between the Senior Circuit Judge and the eight district judges of the Southern District of New York. This Court should not, therefore, minutely scrutinize the procedure by which the occasion is presented to it, but should exercise its broad supervisory power over equity practice and jurisdiction in the lower federal courts and preserve the moral economy of the federal judicial system from the degeneration threatened by the situation exemplified in this case.

The Circuit Court of Appeals reversed the orders of the District Court, not on the merits of the real controversy involved in this case, but on the technical pro-

cedural ground that the petitioners misconceived the remedy for the adjudication of the controversy; that petitioners should have raised their objections by intervention in the receivership proceeding rather than by the bill in equity which they filed. We believe, and will presently urge, that the Circuit Court of Appeals erred in so holding; that petitioners chose a proper remedy; that under it they were entitled to relief; and that the Court of Appeals erred in directing dismissal of their bill.

It should be observed first, however, that the approach employed by the Court of Appeals is inappropriate for the problems involved in this case and should not prevail in this Court.

It is true that, in form, the issues presented by the case arise in a litigation between private parties. In truth, however, the issues concern not alone the conduct of the parties but more particularly, what Judge Woolsey called the "domestic economy" of the district court. They relate not to matters of private right and obligation dependent on the transactions and conduct of the parties litigant, but to the internal management of the Court, the internal administration of its business, irrespective of the parties' acts and transactions. The problems presented arise not from a conflict of opinion on the rules of law which should govern the conduct of the parties, but from a conflict between the Senior Circuit Judge and the eight district judges on how the business of the district court is to be administered—how it is to be distributed among the judges holding district courts.

In a case of as great economic, social and even political significance as that of the Interborough receivership, it is of the utmost importance that the proceedings of the federal court be free of any suggestion of impropriety or irregularity. The federal judicial system is charged with a highly delicate task vital to the success of our federal form of government. It should not be subjected to any

avoidable disturbance from a case with such explosive power as is instinct in this receivership. If, then, the incidence of the situation herein disclosed were limited entirely to this case, the situation would still call for the exercise by this Court of its supervisory and corrective powers. But the incidence of the situation is not so limited. This case is but an instance of a continuing conflict and practice which threatens to destroy the morale of the administration of the district court by the judges appointed thereto and undermine the confidence in the integrity and traditions of the federal bench and bar.

For, the Senior Circuit Judge has, in this case, emphatically declared his intention to continue to act as he has done here. (See his opinion, 1 Fed. Supp. 820.) And the eight district judges, by the unanimous adoption of Rule 1-a (to be discussed later) have emphatically declared their opposition to such conduct and their will to stop it.

To approach the problem presented by this situation from the point of view of whether the parties have properly raised the issue is, then, to misconceive the problem and shut out the light which should guide the attempt at solution. Respondents as well as petitioners should be anxious to have this issue of vital public importance squarely met and decided without resort to evasive and frivolous technicalities. Respondents should join petitioners in asking this Court to decide the fundamental issue and safeguard the administration of this receivership and the federal judicial system against charges of impropriety.

This Court has broad supervisory and corrective powers over the jurisdiction and administration of the lower federal courts. Sometimes, this power is exerted through the issuance of writs of mandamus or prohibition. See

Ex parte Northern Pacific Ry., 280 U. S. 142;
Ex parte Metropolitan Water Co., 220 U. S. 539;

In re Winn, 213 U. S. 458;
Ex parte Skinner & Eddy Corp., 265 U. S. 86;
Ex parte United States, 287 U. S. 241;
Sloss "Mandamus in the Supreme Court" since the Judiciary Act of 1925, 46 Harv. L. Rev. 91.

But the power is not limited in its exercise to any one method. In matters of this sort, the Court may exercise this power whenever it perceives the situation and is in a position to correct it by its decree.

Thus, it is the established and traditional practice of this Court in cases coming before it to scrutinize matters of federal jurisdiction below, even of its own motion and even against the desire of the parties to the action.

Hilton v. *Dickinson*, 108 U. S. 165;
Mansfield, Coldwater & Lake Mich. Ry. v. *Swan*, 111 U. S. 379;
Cameron v. *Hodges*, 127 U. S. 322;
Stratton v. *St. Louis Southwestern Ry.*, 282 U. S. 10;
Smith v. *Wilson*, 273 U. S., 388;

In equity matters particularly may the power of supervision be freely exercised. This Court has paramount power, within the limitations of applicable statutes, to prescribe rules of practice for equity cases in the lower federal courts.

See:

28 U. S. C. A., Sec. 723;
28 U. S. C. A., Sec. 730;
Lane, "Federal Equity Rules", 35 Harv. L. Rev. 276;
Griswold & Mitchell, "The Narrative Record in Federal Equity Appeals," 42 Harv. L. Rev. 483.

And it may prescribe rules for the conduct of lower federal judges in such cases.

See:

Equity Rule 70½, 281 U. S. 773;
cf. *Admiralty Rule 46½*, 281 U. S. 773.

The scope of this Court's power of review in equity cases is unlimited. It may review questions of fact as well as law and correct any errors which, in its opinion, require an exercise of its powers.

Buckingham v. *McLean*, 13 How. (U. S.) 150;
Dodge v. *Knowles*, 114 U. S. 430, 434;
Virginian Ry. v. *United States*, 272 U. S. 658, 675;

and see

Frankfurter and Landis, "The Judiciary Act of 1925", 42 Harv. L. Rev. 1, 29.

It may of its own motion take the objection of want of equity jurisdiction.

Lewis v. *Cocks*, 23 Wall. 466.

See

Twist v. *Prairie Oil Co.*, 274 U. S. 684, 690.

It may reverse a decree below and remand a case for the observance of a practice deemed by it desirable even when not promulgated in the form of a rule.

R. R. Comm. of Wis. v. *Macxy*, 281 U. S. 82;
Pub. Serv. Comm. of Wis. v. *Wis. Tel. Co.*, decided at this Term March 27, 1933;
cf.; *Panama Mail S. S. Co.* v. *Vargas*, 281 U. S. 670.

One of the established reasons which this Court has stated may measure its discretion to grant certiorari is that a circuit court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." General Rules, Rule XXXVIII, 5(b).

We submit that, for the reasons to be stated at once, the situation presented by this case, of utmost importance to the jurisdiction, administration and moral stability of the federal district courts, is before this Court and calls for an exercise of its supervisory power.

POINT II.

The Circuit Court of Appeals erred in assuming that Judge Manton's orders could not be set aside unless it were found that they were so wholly lacking in jurisdiction as to be subject to attack at any time in any court and in any proceeding.

The Circuit Court of Appeals assumed that in order to grant petitioners equitable relief it would have to find that the proceeding before Judge Manton was a complete "nullity" and could be ignored as a "futility", "a phantom suit which would settle nothing and on whose results (the parties) might not later rely". This it believed it could not find. Without ~~their~~ passing, then, on the validity of Judge Manton's orders or the rules of the district court, the Court of Appeals held that there was sufficient "color of authority" for his conduct so as to prevent attack in the manner adopted by the petitioners—even though his acts were so invalid and improper as to authorize their reversal in procedure suggested by the Court. Respondents' counsel are satisfied and even urge that the legality of this receivership, perhaps the largest witnessed in the Southern District of

New York and among the largest in the country, be left in this state of dark doubt and suspicion.

This assumption by the Circuit Court of Appeals was wholly unwarranted and erroneous. The challenge of Judge Manton's acts was made *in limine*, while his acts were still interlocutory and before anything had been done under the receivership which created a situation that could not fairly be disturbed. Petitioners were not seeking a complete disruption of the receivership proceedings. Substantially they sought only a removal of the proceedings to the proper district judge and an appointment of different and independent receivers. The challenge was not made collaterally in another suit between different parties, as incidental to other relief. Nor yet was it made in a different court. Petitioners challenged Judge Manton's conduct not only in its incipient stage but in the same court in which the receivership proceeding was pending and with all persons who were parties to the Brake Shoe case as parties in their action. Such a challenge cannot be analogized to a collateral attack upon a final judgment entered in another suit.

It is true that petitioners attacked Judge Manton's acts as lacking in jurisdiction and prayed that they be set aside as null and void. But their allegations are to be taken in connection with the prayer for relief and the circumstances in which they were made. Under the limitations just indicated, petitioners attacked Judge Manton's acts as lacking in jurisdiction. They are not required to urge, nor is the Court required to hold, that the invalidities pointed out in Judge Manton's orders had any further and more serious effect than to render them invalid if attacked at the outset. They are not required to urge, nor is the Court required to hold, that had no challenge of Judge Manton's orders been made at the time and in the manner above stated, all acts in the receivership could have been avoided and "ignored as futilities".

A. Petitioners' prayers before Judge Woolsey may be regarded and are properly sustainable as petitions in equity to set aside the orders under the traditional jurisdiction of equity courts to enjoin and set aside judgments, orders or decrees on grounds of fraud, mistake or impropriety sufficient to invoke an exercise of the Court's discretionary power.

Courts of equity have traditionally set aside, or enjoined the enforcement of, judgments, orders or decrees procured by fraud, through mistake of the injured party, or by other improper conduct which rendered enforcement of the orders unconscionable.

See *e. g.,*

Johnson v. *Waters,* 111 U. S. 640;
Marshall v. *Holmes,* 141 U. S. 589;
Phillips v. *Negley,* 117 U. S. 665, 674.

Orders, judgments or decrees thus set aside are undoubtedly not lacking in jurisdiction in a sense that they are nullities, that they may be ignored as "futilities or phantom suits" and may be attacked collaterally in other suits between the same or different parties where other objects are sought. Yet they are set aside by equity courts in suits instituted directly for that purpose.

Indeed in construing petitioners' challenge of Judge Manton's orders as collateral within the meaning of the prohibition against collateral attack, the Circuit Court of Appeals misconceived the established distinction between direct and collateral attacks subsumed in that prohibition. As stated by the authoritative treatise on the subject:

> "The object, of course, in which the suit or action is brought is a determining factor. If instituted for the very purpose of setting aside, correcting or modifying the judgment, it is usually regarded as a direct attack, for the attack upon the judgment in such case is not incidental to the object of the pro-

ceeding, and the end of the proceeding is not something collateral to the judgment."

1 Freeman on Judgments (5th Ed. pp. 606-7).

In *Marshall* v. *Holmes* and *Johnson* v. *Waters, supra,* judgments were set aside, in separate suits instituted for that purpose, under circumstances very much weaker than those in the case at Bar. In those suits, this Court affirmed decrees of lower federal courts setting aside final judgments of *state courts* who concededly and beyond question had jurisdiction to enter those judgments—and which judgments purported finally to adjudicate the controversies involved.

In the case at Bar the same Court in which the challenged orders were entered was asked to set them aside. And the orders thus challenged were not final judgments purporting definitely to settle the controversy but were the initial steps in the inauguration of a proceeding contemplated to extend over a period of several years.

In a later portion of this brief, the improprieties and invalidities underlying Judge Manton's orders will be established. Suffice it here to point out that the Circuit Court of Appeals erred in holding that petitioner's challenge was collateral and that it was foreclosed from considering the grounds of the challenge by the supposed prohibition against collateral attack. In the exercise of its discretion this Court has the power to decide what the Circuit Court of Appeals has left undecided and dispose of the case accordingly.

B. Petitioners' prayers before Judge Woolsey may properly be considered also as equivalent to a motion for similar relief made in the receivership proceedings.

As stated above, petitioners' bills were filed in the very court in which the receivership proceedings were pending. All persons in any way interested as parties

in the receivership proceeding appeared and were fully heard on the merits. Nothing different would have happened, had petitioners sought their relief in the receivership proceeding, except that their papers would have been entitled with different captions and except that the respondents might have requested that the motion be referred to Judge Manton pursuant to Rule 4 of district court rules.

That petitioners' papers were improperly entitled surely cannot be made the ground for refusal of their relief. Respondents cannot seriously contend that the determination of the important issues involved in this case should turn on the title of the papers. The regularity of the administration of so large a receivership cannot be left in a shroud of doubt for so frivolous a reason.

That petitioners' prayers were not referred to Judge Manton likewise cannot be made a ground for their denial. Judge Manton had already pre-judged the case. He had already signified that he regarded his orders as within his competence. To have gone before him would have been an entirely useless formality. Moreover, the propriety of his own conduct was in question. This was not the customary attempt to vacate a receivership on grounds which the appointing judge is qualified to decide. This was an attempt to vacate the judge's orders on the ground that his own conduct, deliberately chosen, was unauthorized and improper. On all principles of decency and propriety in judicial administration, Judge Manton would have been disqualified to hear petitioners' prayer and would doubtless have refused himself (compare judicial code Section 20, 28 U. S. C. A. Section 24).

Respondents were in no way prejudiced by petitioners' choice of remedy. In view of Judge Woolsey's order consolidating petitioners' bills with the receivership proceedings and quite apart from the effectiveness of that order, either to constitute a merger of the two causes or an order of intervention, the complete records in both

cases were before the District Court, the Circuit Court of Appeals and are in the record before this Court. Any possible contention that respondents could have made had petitioners' prayers been heard by Judge Manton, could have been and was made before Judge Woolsey and the Circuit Court of Appeals. Any possible information that could have been gleaned from the records had the petitioners' prayers been heard before Judge Manton, was before the District Court and the Circuit Court of Appeals and is in the record in this Court.

C. Petitioners' choice of remedy was not erroneous. But were it otherwise, in view of the serious doubt concerning the validity of any other remedy, their choice should not preclude them from the relief prayed.

We have just shown that petitioners have not chosen an unavailable remedy for securing their relief, even if their bills in the district court be regarded exclusively as an independent and separate suit. The Circuit Court of Appeals conceded that if the rules violated by Judge Manton's orders were mandatory, so as to render his acts entirely null for lack of jurisdiction, the challenge could be made in the manner pursued by the petitioners. Having held however that the rules were directory only the Court further held that the challenge could be made only in the receivership proceeding and not by the bills filed by the petitioners.

The Circuit Court of Appeals conceded further that unless petitioners "had no other recourse" their procedure "was the proper way" (Record, p. 1033). It held that petitioners did have other recourse by way of intervention in the receivership proceedings, motion to vacate, and appeal if necessary from the ruling thereon. And because of the supposed availability of the other remedy thus suggested the Court of Appeals held that petitioners

did not come within this previous concession that unless they had no other recourse their procedure was the proper way.

Neither the Court nor the array of counsel for respondents were able to cite a single case as an exact precedent for the procedure suggested by the Circuit Court of Appeals. The situation which confronted the petitioners when their choice had to be made was novel and without precedent. As against the possibility of a remedy by way of intervention, petitioners were confronted with Rule 37 of the Rules of Equity Practice providing that an intervention must be subordinate to and in recognition of the propriety of the main proceeding. Ample precedent warned them that an intervenor cannot seek the aid of a Court and at the same time attack its jurisdiction; that intervention to challenge the jurisdiction or inaugurate litigation defeating what already has been done in the original suit is not permissible; that where a stranger to a cause seeks to impeach the jurisdiction of the Court entertaining it his proper remedy is by an original bill in equity.

Rule 37, Rules of Equity Practice;
United States v. *California Canneries,* 279 U. S. 553;
Union Trust Co. v. *Jones,* 16 F. 2nd 236;
Board of Drainage Commissioners v. *Lafayette State Bank,* 27 F. 2nd 286;
Hopkins v. *Lancaster,* 254 Fed. 190, 193;
State Trust Co. v. *Kansas City P. & G. R. R.,* 120 Fed. 398, 407.

Petitioners were not parties to the Receivership proceeding. They were warned by precedent that the right to appear specially in an action without waiving jurisdiction, and objecting to the jurisdiction of the Court, is limited to those named as parties in a cause. They were

warned by precedent that the operation of Rule 37 of the Equity Rules might give to their intervention the effect of defeating the basis of their objection.

Moreover, petitioners had no authority on the basis of which to assume that they could prosecute an appeal from an adverse ruling on their motion, which was inevitable if it were to be heard by Judge Manton, to the Circuit Court of Appeals. The Court of Appeals suggests in its opinion that such an appeal could be prosecuted because Section 277 of United States Code, Title 28, permits appeals from interlocutory decrees appointing receivers. Petitioners however were not challenging the propriety of the appointment of receivers for the Interborough. They were willing to concede that a receivership for the Interborough would be proper. What they were objecting to was the appointment of the particular receivers by the particular judge. Conceding the necessity for a receivership they wished to have it conducted in the regular manner by a judge duly authorized to act in the premises in accordance with the applicable statutes and rules and by receivers not associated with, dominated by, or friendly to, the management and interests which controlled the corporation up to the appointment of receivers.

It is thus not at all clear that the petitioners would have been able to prosecute an appeal if they had intervened in the receivership proceedings and had been denied relief by Judge Manton. Since they were objecting to the manner in which the receivership was being conducted, the suitability of the receivers named and the authority of the appointing judge rather than to the necessity and propriety of a receivership, it is very doubtful whether their appeal would fall within a provision permitting appeals from orders appointing receivers.

After the Circuit Court of Appeals has spoken, and if its word is not denied by superior authority, it is of

course clear that the other remedy suggested by the Court is available. The petitioners should not be charged with the responsibility of prophets. The validity of their choice should not be determined with the knowledge of the novel practice which the Circuit Court of Appeals has fashioned in the opinion under review, but rather with the knowledge reasonably chargeable to the petitioners at the time that their choice had been made.

In view of the fact that the availability of the remedy suggested by the Circuit Court of Appeals was concededly enshrouded in doubt, and instinct with the hazard of defeating the entire basis for petitioners' claim to relief, the possible availability of that remedy, subsequently discovered by the Circuit Court of Appeals, should not be considered as *another* method of recourse which made the plaintiff's procedure the *improper* "way." In view of the doubt and the dangers pointed out, the petitioners' procedure should have been considered by the Court as an *available* remedy within its concession that "unless (the parties) have no other recourse, (theirs) was the proper way."

As ~~this Court~~ Justice Cardozo has said:

> "Equity, it is said, will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle and inaction may confirm the purpose of the wrongdoer. *Falk* v. *Hoffman*, 233 N. Y. 199, 203."
>
> *Rogers* v. *Guaranty Trust Co.*, 53 S. Ct. 295, 305, Cardozo, J.

POINT III.

On the merits of the case, Judge Manton's orders in the receivership proceeding were so improper and unauthorized as to entitle petitioners to relief on any of the theories stated above.

A. Judge Manton's order designating himself to hear the application for a receivership on the Brake Shoe Company bill was an improper exercise of his power under Section 22 of the U. S. Code seriously impairing the equal and impersonal administration of justice in the Southern District of New York to the particular detriment of the interests of petitioners in the receivership.

The order designating Judge Manton to hear the receivership case was made pursuant to Section 22 of U. S. Code, Title 28 (Judicial Code, Section 18) providing that: "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the Senior Circuit Judge may, if the public interest requires, designate and appoint any circuit judge of a judicial circuit to hold a district court within such circuit."

Respondents and the Circuit Court of Appeals urge that the section confers administrative power upon the senior circuit Judge, the exercise of which cannot be open to question. They treat petitioners' attack upon this order as equivalent to a contention that an order of designation under Section 22 is *always* subject to challenge at any time and in any proceeding in which the order may be involved. And in view of such dire consequences, the Circuit Court of Appeals sagely remarks: "parties are not subject to the peril that everything decided may be upset, unless they can satisfy another Court that there was an adequate occasion for exercise (of the power conferred by Section 22). The

power can, indeed, be abused, (yet) the remedy may be worse than the evil" (Record, pp. 1032-33).

This treatment entirely misconstrues petitioners' contention and misses its true point. It may be conceded that the exercise of the power conferred upon the senior circuit Judge is ordinarily conclusive and may not be challenged at *any* time and in *any* proceeding where his order of designation may be involved. Petitioners contend only that where it clearly and fully appears that the senior circuit Judge has acted upon grounds unauthorized in the statute and has improperly designated himself to sit in a case for reasons which are perversive of the objects of the statute and the proper administration of judicial business, then a *timely* objection to his order of designation made at the *beginning* of the case in which he has designated himself to sit justifies the vacation of his order and the correction of the abuse. It bears repetition that this Court is not called upon to upset a final judgment on the ground that the order of designation was so unauthorized as to deprive the Judge of all jurisdiction for all purposes. The Court is asked only to find that the authority conferred upon the senior circuit Judge was so improperly exercised as to justify the prevention of a continued functioning thereunder in this case.

Section 22, which forms the basis of Judge Manton's order, does not stand by itself in the Judicial Code. It is preceded and followed by, and is *in pari materia* with, other sections which illuminate its meaning and object. Thus Section 17, entitled "disability of judge; accumulation of business, designation of another judge", specifically states the purpose intended to be subserved:

> "whenever any district judge by reason of any disability or necessary absence from his district or the accumulation or urgency of business is unable to perform speedily the work of his district, the senior circuit judge of that circuit * * * may, if in his

> judgment the public interest requires designate any district judge in the Circuit to act as district judge in such district."

Such seems obviously to be also the considerations constituting the measure of the public interest intended by Section 22. Contemporary interpretation of that section by senior Circuit Judge Lacombe, upon whose conduct counsel for respondents have strenuously relied for precedent, leaves no doubt but that those were the considerations compressed in the expression "public interest". Referring to the fact that when that section of the Judicial Code was enacted Circuit Judges had been engaged in *nisi prius* work which was not completed and which would have been needlessly disrupted had no provision been made for their completion; and referring further to the great burden thrown upon the District Judges by the cases transferred to them of all *nisi prius* work without any increase in their members, Judge Lacombe said:

> "It was suggested (in Congress) that in such cases (those being conducted at *nisi prius* by circuit judges who were transferred to the Circuit Court of Appeals) it would be better, involving less delay, if the circuit judge were allowed to finish his incomplete work, rather than to require the district judge to take up the unfinished cause and familiarize himself with its prior history. It was also suggested that, at least in this district (the southern district of New York), there would sometimes be occasions when the business of the Court, increased as it was by old circuit court work, part of which had been theretofore done by circuit judges, might be so great that the district judges could not promptly dispose of it, while at the same time some of the circuit judges might be able to spare time from the work of the Circuit Court of Appeals. *These suggestions apparently commended themselves to Congress,* for the bill was amended so as

to include the provision above quoted." (Italics ours.)

Pennsylvania Steel Co. v. *New York City Ry.*, 221 Fed. 440 (S. D., N. Y., 1915).

The legislative history of the section strongly confirms this view of its intent.

46 *Cong. Rec.* 83, 88-90, 302, 304, 809, 1452-54, 2144-55, 3998-4002;
Frankfurter & Landis, The Business of the Supreme Court 128-135.

Plainly the term "public interest" does not confer arbitrary power upon the senior Circuit Judge to be exercised at his whim or caprice. Public interest to be comprehended must have some definition. And here it could mean only administrative interest.

Compare

Federal Trade Commission v. *Klesner,* 280 U. S. 19.

Judge Manton has supplied us with an authentic statement of the considerations which in his opinion constituted public interest calling for his designation order. He states in his justificatory opinion (1 Fed. Supp. 820) that he acted upon the affidavit of Interborough counsel stating that public interest required that individuals rather than a trust company be appointed receivers of the Interborough system, and upon the fear that if the receivership were applied for in the regular course before the District Judge duly assigned to receive such applications,

"the District Court *might* ignore Mr. Quackenbush's (Interborough counsel's) affidavit * * * and appoint

a trust company receiver notwithstanding." (Our italics.)

Counsel for the Interborough and the Brake Shoe Company came before Judge Manton on August 25, one day before the bill applying for the appointment of a receiver was filed in the District Court. The affidavit referred to was executed on August 25. Counsel did not even attempt to present the same application and make the same representations as to the character of the receiver to be appointed to the District Court. Although the District Judge duly assigned to receive such applications was in his chambers and available therefor, counsel did not even attempt to consult him. Nor did Judge Manton consult the District Judge whose proper function was to receive bills for the appointment of receivers at that time.

It is said that the fear of the appointment of a trust company as a receiver was justification for the order of designation. And it is said that the proper District Judge was not consulted by counsel before the application was made to Judge Manton, or by Judge Manton after the application was presented to him, because of some previous case in which a trust company was appointed receiver.

But such explanations hardly explain. It is well known that the district court rule in the Southern District of New York requiring the appointment of a trust company as receiver applies only to cases in bankruptcy. It is common knowledge that there is no rule or practice in the District Court requiring the appointment of a trust company as receiver in equity cases. And it is common knowledge, that, quite to the contrary, individuals have been and are repeatedly appointed as equity receivers by the District Judges in the District.

It could hardly be contended that the District Judges are blind to the desirability of appointing individuals as receivers when the interests of the receivership so require.

It could hardly be assumed without inquiry that the District Judge duly assigned to administer this part of the Court's business would not have been influenced by the same considerations which were presented in the affidavit and of the alleged importuning before Judge Manton on August 25th. The slightest regard for regularity in the conduct of a receivership involving so great a public interest would have required at least that the parties present their petition in the proper manner to the duly authorized District Judge. It is inconceivable that a District Judge would not have recognized, even of his own motion, the same considerations requiring the appointment of individuals that were recognized by Judge Manton. Had the District Judge signified his intention not to be convinced by counsel's representation of the necessity for the appointment of individuals as receivers, there would have been ample time thereafter to go before Judge Manton and renew the petition before him.

In addition, the Brake Shoe Company's bill could readily have been filed in the District Court for the Eastern District of New York, located in Brooklyn, as conveniently to the counsel for respondents as is the Court in the Southern District. The Interborough's lines extend into the Eastern District. Certainly with the consent of the Interborough, the suit could have been there maintained. And in the Eastern District, there would have been no possible danger that a trust company might have been appointed, since in that District, trust companies are not appointed either in equity or in bankruptcy.

Obviously Judge Manton's order was not based on the "public interest" in the expeditious administration of the District Court's business; nor yet upon any doubt as to the qualification and competence of the properly assigned District Judge to administer this receivership ably and honestly. The utmost that can be said for his order is that he feared, justifiably or otherwise, that the District

Judge might exercise his discretion and make an order on the merits of the case as presented to him differently from what the Senior Circuit Judge conceived would be appropriate. Such cannot be the basis upon which the Senior Circuit Judge is authorized to make designations under the statute.

Nisi prius work is entrusted by the statute exclusively to the District Courts, administered primarily by District Judges. The Senior Circuit Judge is not personally a Court of Appeals. He is not personally charged with the responsibility, nor given the power, to review decisions of the District Judges in any litigation. Appellate jurisdiction from the District Court is vested in this Court, or in the Circuit Court of Appeals, where the Senior Circuit Judge has but one vote out of three. His sole powers of supervision over the District Court are administrative.

Section 22 does not give to the Senior Circuit Judge the power to supplant District Judges in specific cases and select from the business of the District Court individual cases in which to sit. The power conferred upon him by Section 22 is the general power to designate any Circuit Judge to hold a District Court. His power to make designations for specific cases is derived solely from Section 24 of the U. S. Code, Tit. 28 (Judicial Code, Section 20). And the power thus conferred is expressly limited by that section to cases in which it appears that the District Judge "is in any way concerned in interest * * * or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit at the trial" of the case involved—and then only the power may be exercised on the application of either party. Such, concededly, was not the case here. There is no intimation that the District Judge before whom the application for receivership should properly have been made was disqualified in any way mentioned in Section 24 or otherwise.

Respondents' counsel rely largely upon designations made by Senior Circuit Judges of other Circuits and by prior Senior Circuit Judges of the Second Circuit as practical constructions of the statute and as precedents for Judge Manton's order. The reliance is patently misplaced. It need hardly be answered that no previous error, by its own force, justifies its contention. More pertinently however, counsel cite only the fact that other Senior Circuit Judges have designated themselves to hold District Courts. No information is advanced as to the circumstances in which these orders were made, or as to the extent to which their authority was utilized by the holding of District Courts by Circuit Judges. For all that appears, the designations may have been of the general type, not intended to do more than make available the Senior Circuit Judge for District Court business when the duly authorized District Judges were unavailable for any of the reasons stated in Section 17. And for all that appears, the orders of designation may have remained on the records without being carried to execution by action thereunder on the part of the Senior Circuit Judges.

The only specific instances cited by counsel in which a Senior Circuit Judge has designated himself to sit in a particular case are instances differing widely from the situation presented in this case and coming directly within the purpose of the statute as heretofore detailed. Thus in *United States* v. *Gill*, 292 Fed. 136 and *McClintock* v. *United States*, 60 Fed. (2nd) 839, the Senior Circuit Judge made his designation because the District Judge was disqualified by his interest from hearing the case involved. And in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440, Judge Lacombe designated himself to continue the administration of a receivership which he had commenced and was in the process of administering as a *nisi prius* judge when the Judicial Code elevated him to the Circuit Court of Appeals. And

finally in none of the instances cited by counsel does it appear, as it does in this case, that the District Judges had previously attempted seriously to circumvent the abuses of federal receiverships by the adoption of rules with respect to the sessions in which applications for receivers were to be made, and in none of those instances does it appear that there were the differences between the Senior Circuit Judge and the District Judges that exist in this case, and in none of them does it appear that the Senior Circuit Judge deliberately flouted a rule of the District Court either because of a feeling that the rule was not binding upon him or because of an opinion that he could validly circumvent it by the contortion involved in his second order to be presently discussed.

The consequences of an exercise of power as that of Judge Manton in the order under consideration, upon the administration of justice generally, and upon the interests of the petitioners in this case specifically, are not hard to fathom. It is not compatible with the public interest and the policy of our law, in the equal administration of law, that parties should be privileged to seek out a Judge whom they may regard as favorable to their point of view—especially in equity receiverships, nor can it be conducive of proper administration of justice or respect for the law that duly authorized District Judges should be under the constant threat that unless their discretion is to be exercised in accord with the wishes of the applicant for a receivership, the bill would be removed from his cognizance and presented to another Judge.

The economic importance and political sensitivity of the receivership of the Interborough System has already been mentioned. The necessity for the appointment of independent receivers above all suspicion of reproach cannot be overemphasized. The history of the Interborough Company in New York City should make even the blind see the innumerable possibilities for conflict

between the management of the company, its bankers and associates, and individual or independent stockholders, security owners, creditors, the City of New York, and the public interest generally. Yet one of the receivers appointed was a lawyer, a retired Judge who had passed the age limit prescribed by the New York State Constitution for its Judges, who was then sojourning in Europe and who up to or immediately prior to his appointment had been a member of the firm appointed as counsel for the receivers. These counsel were themselves closely associated with the traction interests in New York City and had a comparatively short time before acted as counsel for the Brooklyn-Manhattan Transit Co., whose Board of Directors interlocks with that of Interborough Rapid Transit Co., and have also acted as counsel for bankers interested in Interborough. Their appointment caused considerable unfavorable comment in the press. Shortly after the commencement of this action and the hearing before Judge Woolsey they resigned (Record, p. 229).

Mystery enshrouds the relation of the receiver Dowling to this firm of counsel. While the public criticism was directed not merely at the firm of counsel, but also at this receiver, he did not chose to follow the example set, but contented himself with an official explanation of the charged relationship. Despite the specific charge levelled against him by public opinion, as expressed in the public press, he was satisfied with making the equivocal answer that "prior to my appointment as temporary receiver of the Interborough Rapid Transit Company pursuant to order of Hon. Martin T. Manton entered August 26, 1932, I had severed my association with the law firm of Chadbourne, Stanchfield & Levy and had no further connection therewith" (Record, p. 498). Significantly he failed, however, to state *when* he severed the association.

Petitioners represent substantial stock and creditor interests in the Interborough and Manhattan receivership. They feel thus greatly aggrieved and their interests seriously prejudiced by the appointment of receivers whom they regard as friendly to and influenced by the management of Interborough whose conduct it will be their function critically to scrutinize.

So far as the Manhattan receiver, William Roberts, is concerned, petitioners believe that his appointment was particularly unwise. For ten years he had been president, director and counsel for Manhattan. Although the lease between Interborough and Manhattan contains stringent provisions for the upkeep ~~of~~ by Interborough ~~and~~ of Manhattan's elevated railway properties, structures, stations and rolling stock, all of which are in the possession of Interborough, it is notorious that the same have been allowed to become dilapidated and antiquated to Manhattan's serious detriment. As a result causes of action for many millions of dollars have accrued against Roberts and his co-directors of Manhattan. Since Robert's appointment as receiver, he and his co-directors have lost the confidence of Manhattan's stockholders and were ousted by them at the last annual meeting, because of the negligent discharge of their offices. Roberts, of course, can hardly be expected to vigorously prosecute an action against himself and his co-directors for his and their neglect of duty. Surely, one who for ten years has neglected his duties as president and director of Manhattan is hardly a wise choice to protect Manhattan as its receiver.

B. Judge Manton's order resolving the factitious disagreement between himself and the eight District Judges on the distribution of the business of the District Court was an unauthorized and improper exercise of his power under Section 27, U. S. Code, Tit. 28 (Judicial Code, Sec. 23), tending to disrupt the morale of the administration of that Court, to promote confusion in its practice, conflict between its Judges and the senior Circuit Judge and opportunities for improper sparring by parties for a favorable Judge or favorable appointments of receivers, to the great detriment of the interests of these petitioners in the Interborough receivership.

Before Judge Manton acted at all in the case at bar, the eight District Judges comprising the District Court for the Southern District of New York had pursuant to Section 27 of U. S. Code, Tit. 28, unanimously agreed upon the distribution among them of the Court's business for the current year. They had unanimously agreed upon and posted a schedule setting forth the sessions which each of them was holding during the period and the character of the business which each would then administer. In order to provide for the possibility of designations of Judges by the Chief Justice, Circuit Justice, or Senior Circuit Judge, the eight Judges had unanimously agreed upon and promulgated District Court Rule 1-a, reading as follows:

> "1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the Senior District Judge."

In order to administer efficiently the business of the Court, prevent confusion in its practice, and avoid abuses in cases of equity receivership, the eight district Judges

had unanimously agreed upon and promulgated District Court Rule 11-a, reading as follows:

> "11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

Confronted with this situation, Judge Manton attempted to circumvent it by issuing an order reciting that as Circuit Judge designated to hold a District Court, he disagreed with the distribution of business thus provided by the District Judges; that as Senior Circuit Judge he resolved that disagreement in favor of himself as a Judge designated to hold a District Court. Pursuant to that order, he felt free to disregard not only the unanimous agreement of the District Judges on the distribution of business, but also the regularly promulgated Rules 1-a and 11-a above set forth. Respondents contend that this conduct was within the scope of the authority conferred upon the Senior Circuit Judge by Section 27 of U. S. Code, title 28. But they also emphatically contend that Rules 1-a and 11-a are invalid and not binding upon a designated Circuit Judge.

1. *Respondents' contention that Rules 1-a and 11-a are invalid is frivolous and unsubstantial.*

The contention that the promulgation of Rules 1-a and 11-a is not within the power of the District Court rests upon the quicksand of misinterpretation and distortion. No mystery surrounds the meaning of these rules. Their meaning and reasonableness is fully obvious. They are rules designed solely for the more efficient administration of the practice and business in the District Court and are fully within the competence of that Court's power to enact rules.

The authority of the District Court to enact rules for the regulation of practice before it and for the efficient administration of its business is not only inherent in that body as a Court, but is expressly recognized by statute and Equity Rules of this Court.

Rose, Fed. Jurisdiction and Procedure, page 47;
28 U. S. Code, Section 731;
28 U. S. Code, Section 27.

Section 27 reads as follows:

> "Section 27. (Judicial Code, Section 23.) Districts with more than one judge; division of business.—In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district. (March 3, 1911, c. 231, Sec. 23, 36 Stat. 1090.)"

If the words of the statute that the District Judges "may agree upon the division of business and assignment of cases for trial" means anything at all, it must mean at least that the District Judges may, as they did in the Southern District of New York, agree upon the sessions to be held, and the character of cases to be heard, by each of them. Likewise if the words of Section 731, *supra*, authorizing the District Courts to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" are to have any meaning at all, they must mean at least that the District Court is empowered to enact administrative regulations of the character of Rules 1-a and 11-a.

Neither rule impairs the statutory jurisdiction of any Judge. No Judge sitting as per the schedule agreed

upon by the District Judges pursuant to Section 27 lacks the complete power to exercise all the jurisdiction conferred upon him by the Constitution and statute without impairment by either rule. The rules simply attempt to organize the personnel of the Court and prescribe where the Judges shall sit and where counsel shall go for the particular type of relief in which they are interested. The rules no more detract from the jurisdiction of the Senior Circuit Judge designated to hold District Court than from that of the District Judges regularly holding such Courts. The ~~condition~~ occasion by designation of an additional Judge to hold a District Court obviously requires some provision for the assignment of business to him. It cannot be expected that he should enter the Court, seek and select business to transact and disrupt the going work of the regular Judges. The provision made by Rule 1-a in contemplation of the designation of the Judge is an eminently reasonable and business-like way of meeting the situation.

Nor can Rules 1-a and 11-a possibly be in conflict with Section 13 of 28 U. S. Code* or other provisions conferring power upon Judges. No such provisions attempt to do more than confer power upon Judges which may be exercised when invoked in the usual and orderly manner. Nor do such provisions do more than confer a power upon the class of Judges dealt with rather than upon any specific Judge particularly situated. Rules 1-a and 11-a do not attempt to detract from this power.

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*28 U. S. C. A. 13.

The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, or issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct and award at Chambers or in the Clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

They do not attempt to strip the District Court at any time of a Judge competent to exercise fully any jurisdiction conferred upon him by any provision of statute or Constitution. On the contrary, the rules have for their purpose the availability of a Judge at all times for the granting of any relief which parties may seek. Their plain function is to apprise parties definitely where to go at any particular time with their applications for relief. It certainly cannot be the purpose of Section 13 of 28 U. S. Code, or other provisions collected through the industry of respondents' counsel, to promote confusion and disorderly administration of justice where *any* Judge could always be called upon to hear *any* kind of application, and where parties could scurry around in search of a particular Judge who might favor their application.

Nor can Rule 11-a be attacked as an equity rule in conflict with Rule 79* of the equity rules promulgated by this Court because not concurred in by a majority of the Circuit Judges. In the first place, respondents have not shown that a majority of the Circuit Judges have not concurred in the rule. Rule 79 does not stipulate the means by which such concurrence is to be manifested. Concurrence by a majority of the Circuit Judges individually, verbally, or by tacit acquiescence may clearly be sufficient to meet the requirements of Rule 79. Respondents have shown only that Judge Manton alone, of the five Circuit Judges in the Second Circuit, has dissented from Rule 11-a. None of the other four judges has expressed a dissent and it is entirely consistent for all that appears that they have verbally or tacitly acquiesced and concurred in the promulgation of that rule.

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*Rule LXXIX—Additional Rules by District Court.

With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

But more emphatically, it is nothing short of absurd to contend that Rule 11-a is an Equity Rule. Its sole and only function is, as Judge Woolsey has said below, to point out the room to which counsel must go with their prayers for the appointment of equity receivers. Nothing in the rule attempts to control or regulate the exercise of the judge's discretion in entertaining and granting or denying applications for receivers. Nothing in the rule attempts to point out or measure the considerations which a judge must take into account in disposing of an application for a receiver. No legal or equitable rule of law, no principle and no standard is in any way affected by Rule 11-a. It is entirely a calendar rule designed to promote efficiency in ordinary administration rather than to have any bearing whatsoever upon the merits of any controversy or the manner in which it is to be disposed of in view of its merits.

Quite as frivolous is the contention of respondents' counsel that Rules 1-a and 11-a are inconsistent with Rule 6 of the Equity Rules promulgated by this Court.* The plain purport of that rule is to require the establishment of regular times and places for the hearing of motions. But the requirement is safeguarded against the possibility of an interpretation as a prohibition against the decision of routine matters by the District Judge at other times. Moreover, the rule deals obviously with District Courts, and not the powers of particular judges. Its language is phrased so as to make clear its requirement that each District Court shall have regular motion days, but that at the same time each District Court shall not be barred from having some Judge available at other

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*Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes.

times and places for the determination of the matters mentioned. It clearly does not mean that in a District like the Southern District of New York, having eight Judges, each Judge shall be available to make the determinations mentioned. It is obviously sufficient if *a* District Judge is available for that purpose. All this quite apart from the consideration that the "interlocutory orders, rulings and proceedings for the advancement, conduct, and hearing of causes", may embrace matters other than the serious business of appointing receivers for going concerns.

The wisdom and reasonableness of Rules 1a and 11a is particularly apparent when considered in the light of the situation with reference to receiverships. Abuses in that field have variously been charged many times and in many places. The opportunities for abuse because of the serious nature of the relief sought, the speed with which the judicial process is invoked and becomes effective, and the temptation for the exercise of a power accompanied by great possibilities of patronage and advancement of selfish interest, are particularly great. Not so long ago abuses of this kind in bankruptcy matters had become a public scandal in the Southern District of New York. And the Judges of that Court have taken the drastic step of requiring that only a trust company be appointed a bankruptcy receiver. In equity cases the District Judges have not taken so drastic a step—influenced perhaps to some extent by the opinions similar to that of Judge Manton that some equity receiverships require, in the public interest, that individuals be appointed. But the Judges have attempted to limit the opportunities for abuse by the enactment of Rules 1-a and 11-a. They have attempted in that fashion to remove from parties the opportunity for canvassing eight or more Judges for the purpose of finding the one who will accord them the most favorable treatment. And they have required that only the particular Judge assigned for

the time being to the consideration of such causes should be approached for that relief. Surely, no public interest would be subserved by a removal of these precautions and a restoration to parties and Judges of the invidious opportunities for sparring that have previously existed.

2. *The contention that Rules 1-a and 11-a violated by Judge Manton, are invalid is not merely unsubstantial but is irrelevant and evasive of the issues involved in this case.*

Judge Manton's order resolving the conflict between himself and the District Judges was based on the assumption, obviously, that the Rules were valid. Otherwise, of course, his order would have been wholly unnecessary. But even if the rules were, contrary to the showing made above, deemed invalid, petitioners' case would be in no way weakened. It is not our contention simply that Judge Manton violated Rules 1-a and 11-a in appointing the Receivers. His orders are not to be adjudged as isolated, individual exercise of power. His orders must be construed in the light of the entire course of conduct which led to the appointment of the Receivers. We contend that this course of conduct in its entirety was so improper and irregular that this Court cannot permit the *continuance* of the receivership under such circumstances. The orders were in violation not only of Rules 1-a and 11-a which respondents challenge, they were in violation also of the schedule duly adopted and promulgated by the unanimous agreement of the eight District Judges for the distribution of the business of the Court pursuant to 28 U. S. C. A., Sec. 27. The power to make such distribution is not and cannot be challenged by the respondents. And it is our contention that Judge Manton's orders were not simply unauthorized because of the violation of Rules 1-a and 11-a, but that they were also highly improper and irregular because of the violation of the schedule for the distribution of

the business of the District Court. Coupled with the impropriety of the original order of assignment and the irregularities presently to be mentioned, this deliberate violation should justify this Court to prevent the *continuance* of this receivership under such auspices.

3. *The order purporting to resolve the factitious disagreement between Judge Manton and the District Judges was an unauthorized and abusive exercise of power under Section 27 U. S. Code, Title 28.*

It must be conceded, of course, that a Senior Circuit Judge has power under Section 27 to resolve a conflict between District Judges on the distribution of District Court business. And it may even be conceded, for the sake of argument, that a designated judge is a District Judge for the purposes of this section so as to entitle the Senior Circuit Judge to resolve a conflict between such a designated judge and the District Judges. But these concessions can in no way strengthen the validity or propriety of the order attacked.

For it must be patent that in this case there did not exist a disagreement which the Senior Circuit Judge was then called upon to resolve. Though in time the order of designation may have been signed before the resolving order, it is obvious that the order of designation and the resolving order were inseparable parts of one plan and course of conduct. By Judge Manton's own concession he disagreed with the distribution of business agreed upon by the District Judges before he designated himself to hold a District Court. His designation order contemplated and was partly intended to create the disagreement which he was then to resolve by his second order. Moreover, by Judge Manton's own concession he signed the two orders not because as designated judge he disagreed with the distribution agreed upon by the District Judges, but because he feared a certain kind of judicial determination by the District Court in a litigation about to be instituted. He, by his own concession,

entered into the situation for the purpose of avoiding that kind of determination. He did not make the designation and then find himself in disagreement, but, on the contrary, created the disagreement, designating himself for that purpose.

Moreover, when Section 27 speaks of disagreement which a Senior Circuit Judge is authorized to resolve, it must contemplate at least some consultation and inquiry for the purpose of ascertaining that disagreement exists, and perhaps the cause or basis of the disagreement, so as to enable him to make a proper order for the division of the Court's business. It is plain in the record of this case that Judge Manton made no attempt before signing the resolving order to inquire from the District Judges whether they were willing to have him sit in the case, or whether some other arrangement satisfactory to them all was possible. *Per contra,* it clearly appears that the designating and resolving orders were signed and filed on the same day and presumably at one and the same time without any attempt to reach an agreement.

Not only was the disagreement factitious, but it was clearly in violation of the policy, if not the letter, of Section 216 of 28 U. S. Code, for Judge Manton to act in the resolution of the conflict. That enactment prohibiting judges sitting in the Circuit Court of Appeals from sitting in review of determinations made by themselves below is founded on the old truth that one is not competent to sit as judge in his own cause, and, as counsel for himself, plead his cause before himself.

> *Moran* v. *Dillingham*, 174 U. S. 153;
> *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339.

The lay view of Judge Manton's conduct in this respect, is reminiscent of Gilbert's and Sullivan's Chancellor, so widely repeated in the press.*

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*See the editorial comments in the "New York Tribune" of October 15th, 1932, and the "New York World-Telegram," September 21st, 1932

C. The order appointing the main receivers for the Interborough and Manhattan was under all the circumstances a wholly improper exercise of discretion in violation of the protective restrictions enunciated by this Court, and repeated warnings against their violation.

It is the traditional doctrine of equity courts that a receiver should not be appointed on the bill of an unsecured simple contract creditor. In the *Metropolitan Railway Receivership* case, 208 U. S. 90, this Court sanctioned a departure from the traditional doctrine under particular circumstances justifying the result, where the defendant corporation had consented to receivership and waived the objection to equity jurisdiction. Since that decision, this Court has several times attempted to shut the door to abuse thus left open. The Court has emphatically and repeatedly warned that its limited sanction of friendly receiverships contemplated only friendliness in the institution of suit by the complainant; that it does not embrace a collusive consent to a receivership for improper purposes; that it does not extend to the misrepresentation or concealment of any matters bearing upon the grounds or purposes of the receivership; and pre-eminently that it does not permit the appointment of receivers friendly to the old management or other special interests, or for any considerations of patronage or self-interest. At the present Term, this Court has said:

> "We have given warning more than once * * * that the remedy * * * is not to be granted loosely, but is to be watched with jealous eyes. * * * Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality."
>
> *Shapiro* v. *Wilgus*, 287 U. S. 348.

And at the preceding Term, the Court said:

> "This court has had occasion to point out the abuses that can arise from friendly receiverships

forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay * * *. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes, lest their function be perverted."

Michigan v. *Michigan Trust Co.*, 286 U. S. 334, 335.

In *Harkin* v. *Brundage*, 276 U. S. 36, the late Chief Justice Taft, speaking for a unanimous Court, incisively depicted the dangers against which Judge Manton should have guarded in his consideration of the Brake Shoe Company's bill. The language of the late Chief Justice, based on a large and understanding experience in this field, is particularly apt in connection with the Interborough receivership:

"The desire of those who represent an embarrassed corporation to seek a refuge from active and urgent creditors, under the protecting arm of an officer of the Court, leads to strenuous efforts to frame a case which may under equity practice justify a receiver. * * *

"More than this, circumstances which should have no influence lead the parties in interest to prefer one court to another in the selection of the person to be appointed as receiver, with the hope on behalf of those in charge of the embarrassed corporation that the appointment may fall to one whose conduct will be in sympathy with, rather than antagonistic to, the previous management of the corporation, in the hands of which the embarrassment has arisen. As the Court of Appeals says, there should be no 'friendly' receiverships, because the receiver is an officer of the court and should be as free from 'friendliness' to a party as should the court itself.

"Nor should there be any competition or rivalry on the part of the two Courts themselves in regard to assuming jurisdiction. The temptation of the exercise of power and patronage in the selection of receivers and the management of great businesses

under the court should not be a featherweight in prompting court action." (Italics ours.)

276 U. S., 36, 55.

See:

41 Yale Law Journal, 1086;
13 Cornell Law Quarterly, 499, 526.

The bill filed by the Brake Shoe Company, and the consent of the Interborough to the appointment of receivers, was more than an attempt to secure a so-called friendly receivership within the sanction of the *Metropolitan Railway* receivership case. It is charged by petitioners that the real motive for the attempt to procure receivers, was concealed from the complainant's bill. That the Interborough could pay the complainant's debt and other current debts as they fell due seems entirely clear from the admitted fact that on the date of the filing of the bill the Interborough had close to $5,000,000 on hand in cash. The real purpose for the receivership proceeding, it is charged in petitioners' bills and can hardly be denied, was to rid the Interborough of the Manhattan lease—a result which the Interborough has for a long time desired. It is further charged by petitioners that to accomplish this purpose Interborough was prepared to destroy Manhattan through a foreclosure of its first mortgage and the wiping out of its stockholders and junior bondholders. The conduct of Interborough receivers in defaulting in the payment of Manhattan's first mortgage interest while, under the protection of the Court, they continued to operate its properties and collect its income lends substance to the charge and strongly corroborates petitioners' contentions. It stamps the receivership as being not merely collusive but fraudulent as well.

The Interborough not only procured a friendly creditor to institute the proceeding, but it sought out a particular judge instead of proceeding in the regular manner; and

made protestations as to the kind of receivers to be appointed. Its success was pleasingly enhanced when, on the petition of the Manhattan Company for an extension of the receivership to it, the President of the Company was appointed sole receiver—despite convincing charges that he was in close accord with the management of the Interborough whose violation of the Manhattan Company's rights and interests had been commonly known for years.

Law journals as well as the public press have commented adversely upon the result of the proceedings and the whole course of conduct leading thereto. See:

42 Yale Law Journal, 279;
46 Harvard Law Review, 503.

Doubt has been expressed, however, as to whether on technical, legalistic grounds the orders could be set aside in the manner sought by the petitioners below. But, as we have already shown, the doubt is entirely unjustified. The violation of statute and rule in the entry of the orders renders them fatally defective.

Weil v. *Neary,* 278 U. S. 160;
In re Rodgers Pyatt Shellac Co., 43 Fed. (2d) 863, aff'd. 51 Fed. (2d) 988 (C. C. A. 2nd Circuit);
Case v. *United States,* 14 Fed. (2d) 510;
Scranton Button Co. v. *Neonlite Corp.,* 105 N. J. E. 708.

Whatever might have been the fate of the orders had they not been challenged until the completion of the receivership, or in a collateral attack, or after the receivership had proceeded to such a state that the harm could not be undone, there can be no doubt that in this proceeding with the attack made directly, at the very beginning

of the receivership and before anything had been done which cannot be saved without causing hardship, the orders may be set aside and propriety in the administration of the Federal Court in the Southern District of New York be restored.

POINT IV.

The grant of petitioners' prayers for relief and the reversal of the decree of the Circuit Court of Appeals need not result in the complete undoing of all that has been done under the receivership if the Court believe that such a result would be unduly harsh.

Counsel for some of the protective committees who intervened in the receivership proceeding, have pathetically appealed for the innocent security-holders whose interest might be irreparably injured by the vacation of Judge Manton's orders. It is characteristic of this plea that the protective committees thus represented are composed primarily of the bankers who dominated the affairs of the company before the receivership.

But such dire consequences, if indeed they would be dire, can readily be avoided by conditions which this Court, in the exercise of sound discretion, may impose upon its reversal of the decree below. The reversal may be accompanied with a provision granting permission for an application to be made to a proper judge for the appointment of new receivers, and the reversal may be accompanied further by a condition that all proper acts of the receivership, which it would be unjust to undo, be validated. To such conditions, petitioners cannot and do not object.

For the reasons indicated above, the petitioners submit that this case calls for an exercise of this Court's supervisory power over the lower Federal Courts, and they

pray that the decree of the Circuit Court of Appeals be reversed.

Respectfully submitted,

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